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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RAUL ARELLANO,

12 Plaintiff,

13 v.

14 DR. SEDIGHI, R. WALKER, Chief
15 Physician and Surgeon, S. ROBERTS,
16 M.D., Chief Medical Executive, et al.,

17 Defendants.
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Case No.: 15-CV-2059-AJB-BGS

ORDER:

**(1) DENYING PLAINTIFF'S
MOTION TO APPOINT COUNSEL;**

**(2) GRANTING PLAINTIFF'S
MOTION FOR CONSIDERATION
OF PLAINTIFF'S OBJECTIONS TO
THE REPORT AND
RECOMMENDATION;**

**(3) GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
THIRD AMENDED COMPLAINT;**

**(4) DENYING PLAINTIFF'S
MOTION FOR INTERLOCTUROY
APPEAL; AND**

**(5) GRANTING PLAINTIFF'S
MOTION FOR COPIES**

(Doc. Nos. 48, 56)

1 Presently before the Court are Plaintiff's motions for appointment of counsel,
2 consideration of his objections to Magistrate Judge Bernard G. Skomal's Report and
3 Recommendation ("R&R"), extension of time to file third amended complaint, request for
4 interlocutory appeal, and request for copies. (Doc. Nos. 48, 56.)

5 **I. BACKGROUND**

6 Plaintiff is currently incarcerated at Richard J. Donovan Correctional Facility ("RJD")
7 in San Diego. (Doc. No. 10 at 2.) In 2010, Plaintiff suffered head trauma that has since
8 caused him seizures and nerve damage. (*Id.* at 7.) From August 2011 until November 2011,
9 Plaintiff was prescribed Gabapentin for his symptoms while he was housed at Calipatria
10 State Prison. (*Id.*) On November 15, 2011, Plaintiff was transferred to RJD. (*Id.*) Plaintiff
11 was then taken off Gabapentin and placed on a new medication. (*Id.*) Plaintiff alleges that
12 the new medication caused severe pain and more frequent and aggressive seizures. (*Id.*) In
13 March 2012, Plaintiff fell from his top bunk causing a lower back injury and symptoms of
14 neuropathy. (*Id.*)

15 Plaintiff filed grievances requesting to change his medication back to Gabapentin
16 because the other medication (1) was "ineffective to [his] symptoms" and (2) gave him
17 "severe side effects such as suicidal thoughts, vomiting" and "deprive[d him] of life
18 necessities; [sic] eating, sleeping exercise." (*Id.*)

19 On March 1, 2015, Plaintiff was placed in the suicide infirmary after a suicide attempt.
20 (*Id.*) While in the infirmary, a psychiatrist took Plaintiff off Elavil and Keppra due to
21 negative side effects, including suicidal thoughts. (*Id.*) On March 11, 2015, Plaintiff was
22 taken off Trileptal, a different seizure medication, due to an allergic reaction and placed on
23 no other medication. (*Id.*) Miss Barros informed Plaintiff that a doctor ("Doe #1") had
24 permanently taken him off all seizure medication until further notice. (*Id.* at 8.)

25 On March 19, 2015, Plaintiff was again placed in the suicide infirmary. (*Id.*) Dr. Sedighi
26 attended to Plaintiff while he was in the infirmary from March 19, 2015 to March 27, 2015.
27 (*Id.* at 9–10.) Plaintiff told Dr. Sedighi that he would like to be placed back on Gabapentin.
28 (*Id.* at 11.) However, Dr. Sedighi did not place Plaintiff on any medication. (*Id.*)

1 Five days later, Plaintiff had a seizure in which he suffered an injury to his neck. (*Id.* at
2 9, 11.) At the time of filing his second amended complaint (“SAC”), Plaintiff was still in
3 pain and could not sleep. (*Id.*) In December 2015, Plaintiff was prescribed Neurontin by a
4 different doctor. (*Id.* at 19.)

5 On September 15, 2015, Plaintiff initiated this action by filing a complaint. (Doc. No.
6 1.) On February 1, 2016, Plaintiff’s complaint was dismissed during initial screening. (Doc.
7 No. 3.) Plaintiff filed his first amended complaint on April 6, 2016. (Doc. No. 7.) This was
8 then dismissed on August 22, 2016. (Doc. No. 8.) On October 19, 2016, Plaintiff filed his
9 SAC *nunc pro tunc* in which he alleges civil rights violations pursuant to defendants Dr.
10 Sedighi, Walker, Roberts, Lewis, Glynn, and Nurse Busalacchi. (Doc. No. 10.) Plaintiff
11 also alleges that all Defendants violated his Eighth Amendment right to freedom from cruel
12 and unusual punishment. (*See generally id.*) Additionally, he alleges that Dr. Sedighi
13 violated his procedural due process rights under the Fourteenth Amendment and his rights
14 under the American Disabilities Act. (*See generally id.*) Defendants filed a motion to
15 dismiss Plaintiff’s SAC. (Doc. No. 20.) Magistrate Judge Skomal issued a Report and
16 Recommendation (“R&R”). (Doc. No. 43.) The Court adopted Magistrate Judge Skomal’s
17 R&R on March 20, 2018. (Doc. No. 44.) Plaintiff filed objections to the R&R on April 2,
18 2018. (Doc. No. 42.)

19 II. DISCUSSION

20 A. Motion to Appoint Counsel

21 There is no constitutional right to the appointment of counsel in § 1983 cases.
22 *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). The Ninth Circuit, however,
23 has held “a court may under ‘exceptional circumstances’ appoint counsel for indigent civil
24 litigants pursuant to 28 U.S.C. § 1915(e)(1).” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th
25 Cir. 2009) (quoting *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004)).
26 “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the
27 likelihood of success on the merits as well as the ability of the petitioner to articulate his
28 claims pro se in light of the complexity of the legal issues involved.” *Id.* (quoting *Weygandt*

1 *v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). Neither of these considerations are dispositive
2 and instead must be viewed together. *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,
3 1331 (9th Cir. 1986)).

4 Plaintiff has requested counsel be appointed due to his lack of his vision from a
5 suicide attempt. (Doc. No. 48 at 2.) While the Court is certainly sympathetic to Plaintiff's
6 injury, Plaintiff has failed to demonstrate a likelihood of success on the merits and he has
7 consistently demonstrated his ability to litigate his claims. For example, Plaintiff's
8 complaint was dismissed during the initial screening process with leave to amend, Plaintiff
9 was able to file a motion for extension of time and file an amended complaint. (Doc. Nos.
10 5, 7.) When Plaintiff's amended complaint was dismissed, he was able to file a second
11 amended complaint. (Doc. Nos. 8, 10.) When Defendants filed a motion to dismiss,
12 Plaintiff was able to again request for an extension of time and respond to the motion to
13 dismiss. (Doc. Nos. 27, 31.) Where a pro se civil rights plaintiff demonstrates he
14 understands basic litigation procedure and has been able to articulate his claims adequately,
15 he has not met his burden to establish exceptional circumstances exist to appoint counsel.
16 *See Palmer*, 560 F.3d at 970.

17 Further, the Court in *Arellano v. Hodge*, No. 14-CV-00590-JLS-JLB, ordered the
18 Office of the Attorney General to submit a report on Plaintiff's claim of his vision
19 impairment, which has been filed in the instant action. (Doc. No. 50.) The report establishes
20 that Plaintiff has been examined by a physician and an optometrist, and both could not find
21 a reason for Plaintiff's blurry vision. (*Id.* at 3.) Further in a supplemental report, the
22 ophthalmologist found that Plaintiff's eye exam was normal and again stated that there was
23 no medical reason for Plaintiff's claimed vision problem. (Doc. No. 51 at 6.) Plaintiff has
24 also been provided with access to equipment in the law library to magnify or read text. (*Id.*
25 at 2.) Further, Plaintiff has been provided with a skilled inmate to read text and to act as a
26 scribe in preparing written documents. (*Id.*) Plaintiff's argument that the skilled inmate and
27 the law library staff cannot provide him with legal advice does not raise to the level of
28 "exceptional circumstances" to be appointed counsel. (Doc. No. 53 at 1.) Accordingly, the

1 Court **DENIES** Plaintiff's motion for appointment of counsel.

2 B. Consideration of Objections to Report and Recommendation

3 Plaintiff requests that the Court consider his objections to Magistrate Judge
4 Skomal's R&R as they were timely. (Doc. No. 56 at 2.) Objections to the R&R were due
5 on March 13, 2018. (Doc. No. 43 at 27.) Plaintiff's objections were received by the Court
6 on March 23, 2018 and were postmarked on March 21, 2018. (Doc. No. 46.) The Court
7 had already adopted Magistrate Judge Skomal's R&R. (Doc. No. 44.) Despite the
8 objections being untimely, the Court **GRANTS** Plaintiff's request that the Court consider
9 his objections. Accordingly, the Court will address Plaintiff's objections to the R&R below.

10 i. *Legal Standard*

11 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
12 judge's duties in connection with a magistrate judge's report and recommendation. The
13 district judge must "make a de novo determination of those portions of the report . . . to
14 which objection is made[,]" and "may accept, reject, or modify, in whole or in part, the
15 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C);
16 *United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). However, in the absence of
17 timely objection(s), the court "need only satisfy itself that there is no clear error on the face
18 of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) advisory
19 committee's note to 1983 amendment; *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
20 (9th Cir. 2003).

21 ii. *Objections to the Report and Recommendation*

22 Plaintiff asserts several objections to Magistrate Judge Skomal's R&R. (*See*
23 *generally* Doc. No. 46.)

24 First, Plaintiff asserts that he provided the Court with the names of the Defendants
25 and accordingly, his allegations towards the four Defendants are not vague and conclusory.
26 (Doc. No. 46 at 2.) However, individually naming the four Defendants does not correct
27 Plaintiff's vague and conclusory allegations. There is vicarious liability for civil rights
28 violations. *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009); *Jones v. Williams*, 297 F.3d

1 930, 934 (9th Cir. 2002); *Peralta v. Dillard*, 744 F.3d 1076, 1085–86 (9th Cir. 2014). A
2 prison official’s alleged improper processing of an inmate’s grievance, without more, fails
3 to serve as a basis for section 1983 liability. *See generally Ramirez v. Galaza*, 334 F.3d
4 850, 860 (prisoners have no “separate constitutional entitlement to a specific prison
5 grievance procedure”); *see also Shallowhorn v. Molina*, 572 Fed. App’x 545, 547 (citing
6 *Ramirez*, 334 F.3d at 860) (finding that the district court properly dismissed section 1983
7 claims against defendants who “were only involved in the appeals process”); *Cummer v.*
8 *Tilton*, 465 Fed. App’x 598, 599 (9th Cir. 2012) (same); *Dragasits v. Yu*, No. 16-CV-1998
9 BEN (JLB), 2017 WL 3141802, at *14 (S.D. Cal. July 24, 2017) (collecting cases relying
10 on *Ramirez* to hold that a “prison official’s mere administrative review of a prisoner’s
11 health care appeal cannot serve as the basis of the official’s liability under § 1983”),
12 *adopted* 2016 WL 87375772 (S.D. Cal. Apr. 29, 2016), *aff’d sub nom. Bell v. Glynn*, 696
13 Fed. App’x 249 (9th Cir. 2017).

14 Plaintiff simply alleges that “all Defendants knew through my grievances that I was
15 receiving inadequate and ineffective course of treatment.” (Doc. No. 10 at 22.) This is a
16 vague and conclusory allegation and is insufficient to survive a motion to dismiss. *See Ivey*
17 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.3d 266, 268 (9th Cir. 1982); *Jones*, 733 F.2d
18 at 649. The issue is not that Plaintiff failed to name each individual defendant, but rather
19 that Plaintiff failed to allege that these defendants were personally involved in any
20 decisions about the appropriate course of Plaintiff’s treatment.

21 Second, Plaintiff asserts that inferences can be made from his allegations in his
22 complaint to show that he pled these defendants were personally involved in any decisions
23 about the appropriate course of Plaintiff’s treatment. (Doc. No. 46 at 2.) The Court may
24 draw reasonable inferences from the factual content of the complaint. *Iqbal*, 556 U.S. at
25 678. The Court must “draw on its judicial experience and common sense.” *Id.* at 679.
26 Specifically, Plaintiff alleges that the following allegations from his complaint are adequate
27 to draw an inference that the defendants were personally involved in any decisions about
28 the appropriate course of Plaintiff’s treatment:

- From May 2015–August 2015 through grievances I informed all the defendants about my emergency’s serious medical needs, but they all didn’t do nothing to help. Instead they left me to suffer on the conditions that was depriving me of life necessities.
- I also let doctors of Medical Appeal Coordinators that besides medication being ineffective to my symptoms (of serious medical needs) their [sic] also giving me side effects such as suicidal thoughts, vomiting, etc. (Life at risk as harm). And all of that was depriving me of life necessities; Eating [sic], sleeping, exercise.
- This [sic] 4 defendants are in charge to review grievances by inmates whenever inmates are in a situation where neither doctors or nurses are not giving them a course of medical treatment that does not reduce symptoms of severe pain that deprives inmate of life necessities or that puts inmate on a life risk of harm. Or when inmate is receiving a [sic] inadequate medical treatment that its side effects are giving a life risk of harm, or is not being effective to the symptoms.

(Doc. No. 10 at 8, 9, 22.) These allegations do not provide a reasonable inference that Defendants were personally involved in any decisions about the appropriate course of Plaintiff’s treatment. For example, Plaintiff has not alleged facts that Defendants personally reviewed Plaintiff’s medical records or interviewed Plaintiff. Further, defendants Walker, Roberts, Lewis, and Glynn as Plaintiff has alleged have not had any sort of medical training to assess Plaintiff’s condition. Walker does have the title Chief Physician and Surgeon, however Walker was justified in relying on the opinions of qualified medical staff in responding to Plaintiff’s grievances. *See Peralta*, 744 F.3d at 1087 (finding no Eighth Amendment deliberate indifference claim arising from a physician’s response to a grievance where they relied on the medical opinions of staff who investigate the plaintiff’s “complaints and already signed off on the treatment plan.”); *Doyle v. California Dep’t of Corrections and Rehabilitation*, No. 12-CV-2769-YGR, 2015 WL 5590728, at *9 (N.D.

1 Cal. Sept. 23, 2015). Accordingly, Plaintiff has failed to establish a plausible claim of
2 deliberate indifference against defendants Walker, Roberts, Lewis and Glynn.

3 Next, Plaintiff explains that he has now provided authority to support his allegation
4 that California Code of Regulations, title 15, section 3350(a) gives rise to a liberty interest
5 warranting protection pursuant to the Fourteenth Amendment Due Process Clause. (Doc.
6 No. 46 at 8.) Plaintiff relies upon *Gibson v. Cty. Of Washoe, Nev.*, 290 F.3d 1175 (9th Cir.
7 2002). However, *Gibson* does not support this contention. The Ninth Circuit does not even
8 discuss California Code of Regulations, title 15, section 3350(a) in this opinion. *See*
9 *generally id.* Furthermore, *Gibson* was overturned in 2016 by *Castro v. Cty. of Los Angeles*,
10 833 F.3d 1060 (9th Cir. 2016). Accordingly, Plaintiff has still failed to provide any
11 authority that California Code of Regulations, title 15, section 3350(a) gives rise to a liberty
12 interest warranting protection pursuant to the Fourteenth Amendment Due Process Clause.
13 Plaintiff has failed to state a claim under the Fourteenth Amendment for any due process
14 violation, thus, Plaintiff's objection that Dr. Sedighi did violate California Code of
15 Regulations, title 15, section 3350(a) is also moot.

16 Plaintiff appears to state an objection to the fact that he does have a disability under
17 the ADA. (Doc. No. 46 at 12.) Magistrate Judge Skomal explicitly stated that "the Court
18 has assumed that his history of seizures would qualify as a disability under the ADA."
19 (Doc. No. 43 at 24.) Accordingly, Plaintiff's objection is moot.

20 Plaintiff objects to the Court's assertion that Plaintiff was not completely denied
21 medical care and thus, Plaintiff has not alleged a complete deprivation of necessary
22 treatment to establish a violation of the ADA. (Doc. No. 46 at 12.) Plaintiff states "I don't
23 know how does that justify [sic] Dr. holding me to be off my medication and not
24 prescribing a new medication." (Doc. No. 46 at 12.) However, Plaintiff, by his own
25 admission, was receiving medication to control his seizures and pain. (Doc. No. 10 at 7-9,
26 15, 20, 27.) Plaintiff's claims are not adequate to establish a claim under the ADA. *See*,
27 *e.g., Payne v. Ariz.*, No. CV-09-1195-PHX-NVW, 2010 WL 1728929, at *5 (D. Ariz. Apr.
28 26, 2010) ("That the State initially failed to diagnose [plaintiff's] diabetes amounts to no

1 more than a negligent medical judgment. Furthermore, that [plaintiff] received any glucose
2 tablets, insulin, and food, albeit sporadically, indicates that there was no outright and
3 deliberate denial of access to care.”); *Razon v. Cty. of Santa Clara*, No. 17-CV-00869-
4 LHK, 2018 WL 405010, at *10 (N.D. Cal. Jan. 12, 2018) (that plaintiff “received any
5 oxygen therapy, medication, and monitoring at all indicates that there was no outright and
6 deliberate denial of access to care”).

7 Plaintiff objects to the denial of revealing the identity of Doe #1. (Doc. No. 46 at
8 13.) Plaintiff states that he ordered his medical records and “the information of who took
9 me off such medication, as its reasons or for how long was he planning to keep me off.
10 [sic] Are not on the contents of the medical records provided to me by prison.” (Doc. No.
11 46 at 13.) “Under Rule 34(a), Plaintiff has the right to request from any party production
12 of documents ‘which are in the possession, custody or control of the party upon whom the
13 request is served.’” *Singleton v. Hedgepath*, No. 1:08-CV-00095, 2011 WL 1806515, at *8
14 (citing Fed. R. Civ. P. 34(a)(1)). Here, Plaintiff has been provided with the medical records
15 to determine the identify of Doe #1. Accordingly, the Court will not require Defendants to
16 produce documents that are equally accessible to both parties. Thus, the Court affirms its
17 decision to deny Plaintiff’s motion to disclose the name of Doe #1.

18 Accordingly, the Court **AFFIRMS** its Order adopting the R&R, (Doc. No. 44), and
19 **OVERRULES** Plaintiff’s Objections, (Doc. No. 46). The Court **GRANTS** Plaintiff leave
20 to file a third amended complaint. Plaintiff has until **April 16, 2019** to file a third amended
21 complaint curing only the deficiencies noted within Magistrate Judge Skomal’s R&R.
22 Plaintiff should not address the causes of action that have been dismissed with prejudice.

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1 C. Motion to Certify an Interlocutory Appeal

2 Plaintiff requests to certify the Court's decision finding his objections as moot.
3 However, the Court has now considered Plaintiff's objections, accordingly this request is
4 moot. Plaintiff further requests to certify the Court's March 20, 2018 Order adopting
5 Magistrate Judge Skomal's R&R. (Doc. No. 56 at 2.) Pursuant to 28 U.S.C. § 1292(b):

6 When a district judge, in making in a civil action an order not
7 otherwise appealable under this section, shall be of the opinion
8 that such order involves a controlling question of law as to which
9 there is substantial ground for difference of opinion and that an
10 immediate appeal from the order may materially advance the
11 ultimate termination of the litigation, he shall so state in writing
12 in such order. The Court of Appeals which would have
13 jurisdiction of an appeal of such action may thereupon, in its
14 discretion, permit an appeal to be taken from such order.

15 District courts should only certify an interlocutory appeal in "rare circumstances"
16 because "[s]ection 1292(b) is a departure from the normal rule that only final judgments
17 are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan,*
18 *Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). Therefore, certification pursuant to § 1292(b)
19 is appropriate "only in exceptional situations." *In re Cement Antitrust Litig.*, 673 F.2d 1020,
20 1026 (9th Cir. 1982) (citing *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966)
21 (per curiam)); *Milbert v. Bison Labs.*, 260 F.2d 431, 433–35 (3d Cir. 1958)). The party
22 seeking the interlocutory appeal bears the burden of establishing that the requirements for
23 certification are met. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

24 Here, Defendant's motion to dismiss was granted as to defendants Walker, Roberts,
25 Lewis and Glynn and two of his claims against Dr. Sedighi. (Doc. No. 43 at 27.) This order
26 does not preclude Plaintiff from going forward with his claims against Nurse Busalacchi
27 and his Eighth Amendment Claim against Dr. Sedighi. This is not a matter that will
28 "materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b). After
a final judgment in this matter, Plaintiff is free to appeal the Court's ruling. Accordingly,
the Court **DENIES** the motion for leave to file an interlocutory appeal.

1 D. Motion for Copies


2 Plaintiff requests copies of the March 20, 2018 Order adopting the R&R, the April
3 2, 2018 Notice of Document Discrepancies and Order, and the April 2, 2018 Objection to
4 the R&R. The Court finds good cause exists and **GRANTS** Plaintiff's request for copies
5 of Docket Numbers 44, 45, and 46.

6 **III. CONCLUSION**

7 Accordingly, the Court **DENIES** Plaintiff's motions for appointment of counsel,
8 **GRANTS** Plaintiff's motion for consideration of his objections to Magistrate Judge
9 Bernard G. Skomal's Report and Recommendation ("R&R"), **GRANTS** Plaintiff's
10 motion for extension of time to file third amended complaint, **DENIES** Plaintiff's request
11 for interlocutory appeal, and **GRANTS** Plaintiff's request for copies. Further, the Court
12 **AFFIRMS** its adoption of Magistrate Judge Skomal's R&R and **OVERRULES**
13 Plaintiff's objections. Plaintiff has until **April 12, 2019** to file a third amended complaint
14 curing only the deficiencies noted within Magistrate Judge Skomal's R&R.

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16 **IT IS SO ORDERED.**

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18 Dated: March 5, 2019

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20 Hon. Anthony J. Battaglia
21 United States District Judge
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